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Vernon S. Cheever and Charlie Garofolo v. Orval R. Schramm and Harold L. Christensen : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

VERNON S. CHEEVER and
CHARLIE GAROFOLO,

Plaintiffs and
Respondents,

vs.

ORVAL R. SCHRAMM and
HAROLD L. CHRISTENSEN,

Defendants and
Appellants.

Case No. 15147

APPELLANTS' BRIEF ON APPEAL

STATEMENT OF NATURE OF CASE

This is an action brought by a Seller of an auto repair business against the Buyer for a breach of contract.

DISPOSITION IN LOWER COURT

This case was tried in the lower Court, and the Court found that a Sales Contract existed between the parties, and awarded the selling party damages for breach of contract by the Buyer, and dismissed the Buyer's Counterclaim.

RELIEF SOUGHT ON APPEAL

The Defendants seek a reversal of the findings of the lower Court. The Defendants also seek to have the case remanded for a determination of the Defendants' damages herein. In the alternative, the Defendants seek to have the case remanded for a new trial.

STATEMENT OF FACTS

On February 1, 1976, the Defendants entered into an Earnest Money Agreement (Plaintiffs' Exhibit 1) R., Page 94, concerning the purchase of the C & B Sports Car Service Center, which was being operated by the Plaintiffs. This Agreement was secured with TWO HUNDRED DOLLARS (\$200.00) paid by the Defendants to the Plaintiffs at the time the Earnest Money Agreement was executed (TR., Page 16). The Earnest Money Agreement was subject to several conditions precedent, which are explained in detail in Appellant's Argument No. 1. The Defendants entered into possession of the premises of the business on February 9, 1976. (TR., Page 19, Lines 23-27). On February 18, 1976, nine (9) days after taking the business, the balance of the agreed on SIX THOUSAND DOLLARS (\$6,000.00) purchase price was paid over to the Plaintiffs by the Defendants. (Page 21, Lines 26-30). On or about March 10, 1976, for the first time, a Lease Agreement, which was to be the underlying and basic agreement between the parties, was presented to the Defendants. (TR., Page 70, Lines 23-30). Within five (5) to eight (8) days

after the Defendants had an opportunity to review the intended Lease Agreement between themselves and Siskon Investment Company, the LESSOR, the Defendants, vacated the premises. (TR., Pages 50-51). Plaintiffs then sued the Defendants for breach of contract, and the lower Court upheld the Plaintiffs' claim, and dismissed the Defendants' Counterclaim.

ARGUMENT

POINT I.

THE COURT ERRED IN FINDING THAT ALL CONDITIONS PRECEDENT TO THE FORMATION OF THE CONTRACT HAD BEEN MET.

17 Am. Jur. 2d, Contracts, §24, states:

"In negotiating a contract the parties may impose any condition precedent, the performance of which is essential before they become bound by the Agreement; in other words, there may be a condition precedent to the existence of a contract. Reduction of the Agreement to writing, or to a different form may be a condition precedent to its taking effect. It has been held that parties to a written contract may agree that the contract is not to be operative until the happening of an oral condition, and consequently that it may be shown that the contract did not become operative because the oral condition was not fulfilled. A promise, or the making of a promise, may be conditioned on the act or will of a third person. Where both parties know and understand that a writing is not to ripen into a contract until the happening of a condition precedent, such as the approval of the contract by the parties attorneys, acts of the parties may not be interpreted as an assent to the writing." (Emphasis added).

If there be any doubt as to what was intended by the parties, as to the Agreement they entered into on February 1976, it is clear that any doubt must be resolved against the Plaintiffs in this action, as the Plaintiffs drew up the Agreement and selected the language. (TR., Page 17, Lines 13-16). (See Bryant v. Deseret News Publishing Company, 120 U 241, 233 P2d 3 Seale Tayco Inc., 16 U2d 323,400 P2d 503 (1965), Skousen v. Smi 27 U2d 169, 493 P2d 1003 (1972).

In this case, the validity of the contract entered by the parties was expressly conditioned upon the happening of (5) events. Four (4) of which were contained in the only writing between the parties; namely, the Plaintiffs' Exhibit 1. These conditions precedent are:

1. That Siscon Development (Sic) Corp. accept the Defendants as suitable tenants. (Line 31, Plaintiffs' Exhibit 1 R, page 94.
2. That the Plaintiffs' Lease be taken over by the Defendants. (Line 22, Plaintiffs' Exhibit 1), R, page 94.
3. That a contract of sale, or instrument of conveyance be made in the approved form of the Utah Securities Commission. (Line 35, Plaintiffs' Exhibit 1). R, page 94.
4. That an inventory of equipment and supplies of the business be supplied. (Line 14-15, Plaintiffs' Exhibit 1). R, page 94.
5. That Plaintiff CHARLIE GAROFOLO provide thirty forty-five (30-45) days of assistance in operation of the business after Defendants took control of the business. (TR., Pages 83-

None of the above five (5) conditions were proved to have been fulfilled by the Plaintiffs.

1. The Plaintiffs introduced through inadmissible

as suitable tenants, but no officer of Siscon Investment Corp. even testified as to acceptance of the Defendants as suitable tenants. (TR., Page 26, Lines 19-22).

2. The Defendants were not allowed by the Plaintiffs to take over the Plaintiffs' Lease with Siscon Investment Corp., instead the Plaintiffs attempted to get Siscon Investment Corp., to re-negotiate an entirely new Lease with the Defendants. (TR., Page 53, Lines 12-20).

3. No formal Sales Contract or instrument of conveyance was ever executed by the Plaintiffs to the Defendants as was required as a condition of the February 1, 1976, Agreement. (TR., Page 74, Lines 4-6 , and Line 35 Plaintiffs' Exhibit 1, R, page 94)

4. No inventory of equipment or supplies of the business was ever delivered to the Defendants as was required as a condition precedent by the parties' February 1, 1976, Agreement. (TR., Page 40, Lines 9-11, & Page 85, Lines 11-16). (R, page 94)

5. There is no evidence on record to refute the statements of Defendants that CHARLIE GAROFOLO agreed to provide thirty to forty-five (30-45) days of assistance in operation of the business after Defendants took control of the business. While in fact, Mr. Garofolo stayed only two to three (2-3) days; coincidentally, long enough to get his money. (TR., Page 86, Lines 22-29).

Therefore, while four (4) conditions precedent were expressly mentioned by the parties in their only written document, (Plaintiffs' Exhibit 1), and the fifth (5th) was orally agreed to by the parties, none of those conditions have been proved by the

Plaintiffs with competent evidence as having been fulfilled.

This Court has clearly stated that the parties must be bound by conditions which they write into their contracts. The case of Jones v. Acme Building Products, Inc., 22 U2d 202, 450 P2d 743 (1969) states:

"Generally speaking, neither of the parties to a contract, nor the Court have any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced in accordance with the intention as manifested by the language used."

Also see Ephraim Theater Company v. Hawk, 7 U2d 163, 321 P2d 221 (1958).

To allow this Agreement between the Plaintiffs and Defendants to take effect without the fulfillment of the condition precedent thereto is clearly contrary to the authority established by Jones v. Acme Building Products, Inc., Supra, and Ephraim Theater Company v. Hawk, Supra. Therefore, the trial Court erred and should be reversed as a contract never arose between the parties and the Defendants are not liable to the Plaintiffs for any breach of contract.

POINT II.

THE COURT ERRED IN FINDING THAT THE PLAINTIFFS DID MISREPRESENT THE BUSINESS OR ITS OPERATION TO THE DEFENDANTS.

The essential elements of proving a fraudulent misrepresentation as found by this Court in the cases of Pace, et al v.

Parrish, et al, 122 U 141, 247 P2d 273 (1952), Stuck v. Delta Land & Water, 63 U 495, 247 P 791 (1924), Jones v. Pingree, 73 U 190, 272 P 303 (1928) are:

1. That a representation was made;
2. concerning a presently existing material fact;
3. which was false;
4. which the misrepresentator either,
 - a. knew to be false, or
 - b. made wrecklessly knowing that he had insufficient knowledge upon which to base such representation;
5. for the purpose of inducing the other party to act upon it;
6. that the other party acting reasonably and in ignorance of its falsity;
7. did in fact rely upon it;
8. and was thereby induced to act;
9. to its injury and damage.

In this case there are a total of five (5) material misrepresentations made by the Plaintiffs to the Defendants. They are:

1. That the Plaintiffs were operating the business at a profit of \$10,000.00 per month. (TR., Page 83, Lines 4-6).
2. That the Plaintiffs' business was so good that they did not need to advertise any longer. (TR., Page 82, Lines 26-30).
3. That the employees were being paid a commission, when in fact they received weekly salaries. (TR., Page 83, Lines 9-13).
4. That the loan the Defendants were to assume was

in the amount of \$9,400.00, (TR., Page 80 & 84), when in fact, the loan amount was \$11,500.78. (TR., Pages 89 & 90).

5. That the value of the equipment of the business was \$12,000.00 to \$14,000.00, (TR., Page 82, Lines 16-25), when in fact the value of the equipment was around \$2,500.00. (TR., Page 85, Lines 1-10).

All five (5) of the above representations were made to the Defendants, and each one represents a presently existing material fact, and all five (5) of the statements are false.

As to the falsity of the statements, the evidence which has been introduced by the Plaintiffs in the form of Plaintiff Exhibit No. 7, (R, page 95.), clearly establishes that the business of the Plaintiffs was not doing well. The business records indicate that for the calendar year 1976, the Plaintiffs had gross sales of \$10,156.55. Those same records indicate that the Plaintiffs had non-capital expenses of \$12,491.60, for the period of time. In addition to these non-capital expenses, the Plaintiffs had expended \$3,179.76 for capital items, which would make a net deficit for the three (3) month period of operation the year 1976, of \$5,514.81. The evidence on its face clearly rebuts the testimony of the Plaintiffs in stating that the business had done well under their operation, when in point of fact they had lost over \$5,000.00 in the first three (3) months of operation. Even if one assumes that all of the capital items (operating supplies) are still on hand, and were not expended by the business, there would have been a deficit of \$2,333.05, for the three (3) months of operation.

Therefore, it is clear that the business was not operating at a \$10,000.00 profit, either net or gross, and there wasn't sufficient business to quit advertising. Also, it is clear from the evidence that the employees were receiving salaries, and not commissions. (TR., Page 88, Lines 15-23).

The evidence is also clear that the loan the Defendants were to assume was in fact for an amount much greater than was represented to the Defendants by the Plaintiffs. (TR., Pages 80, 84, 89 and 90).

The evidence clearly shows that the value of the equipment of the business was greatly misrepresented by the Plaintiffs. (TR., Pages 82 & 85).

All five (5) statements had to have been known by the Plaintiffs to be false at the time they were made as they had prepared and held the business bookkeeping records, and had paid the employees.

The only possible reason for making the statements was to induce the Defendants to purchase the Plaintiffs' business. The statements did in fact induce the Defendants to sign the Earnest Money Agreement in reliance on the statements to their detriment, (TR., Pages 87, 88, 89, 97, 98, & 99), and they were in fact damaged by agreeing to purchase a losing operation. (TR., Pages 85 & 86).

Therefore, all of the elements of fraud are present.

A fraud sufficient for rescission of the contract, and damages caused thereby has been found by this Court for a single

misrepresentation which is the same as one of the five (5) misrepresentations involved herein. Specifically, in the case of Beyener v. Continental Dry Cleaners, Inc., 598 P2d 898 (1976) which involved the sale of a small business in which the Sellers misrepresented to the Buyers the amount of income the business had been grossing, this Court held that a fraud had been perpetrated upon the Buyer by the Sellers sufficient to allow Buyer to rescind the contract and receive damages. The Court stated in that case:

"In view of these facts, Defendants (Sellers) urgency that Plaintiffs (Buyers) should have learned what the facts were is indeed intriguing to one's sense of justice. The law does not generally approve nor give any advantage to one who intentionally deceives another, obstructs him from learning the facts, and then attempts to impute fault and responsibility to the other party for believing him." (Emphasis Added)

The case presently before the Court is an even stronger case for a finding of fraud by the Sellers. This case involves five (5) misrepresentations, and there was a timely abandonment of the present premises by the Buyer upon his realization of the fraud that was involved. Yet, the lower Court refused to grant rescission or damages to the Defendants herein. Instead, the lower Court rewarded the wrongdoers by giving them damages for successfully carrying out their fraud upon the Defendants.

As stated by the Court in the case of Crompton v. Beedle, 83 VT 287, 75 A. 331 (1910) :

"In the case of active misrepresentation it is no answer, in proceedings either for damages, or for setting aside a contract, to say that the party complaining of the misrepresentation had the means of making inquiries" "No man can complain that another has too implicitly relied on the truth of what he himself has stated."

Further, 17 Am Jur, Contracts, §151 states:

"It is said that if consent is obtained by meditated imposition or circumvention, it is to be treated as a delusion, and not as a deliberate and free act of the mind. Although the law will not generally inquire into men's acts and contracts to determine whether they are wise and prudent, yet it will not suffer them to be entrapped by the fraudulent contrivances or cunning or deceitful management of those who purposely mislead them. Fraud is material to a contract where the contract would not have been made if the fraud had not been perpetrated." (Emphasis added)

Such is the case here, where the Defendants have been defrauded by the Plaintiffs. And here the Defendants, therefore, sought rescission of their Contract by abandoning the business, and do hereby seek rescission thereof with damages for the fraudulent acts of the Plaintiffs.

CONCLUSION

The lower Court erred in finding that a valid contract of sale existed between the parties. This is so because the conditions precedent to the formation of the contract established by the parties in their preliminary agreement were not fulfilled. Therefore, a valid Sales Contract between the parties never arose.

Even if the conditions precedent to the formation of a Contract had been fulfilled by the parties, the Plaintiffs' fraudulent misrepresentations to the Defendants made the Contract void and rescindable by the Defendants at their option.

Therefore, the Defendants seek to have this Court reverse the decision of the Lower Court, and remand the case for a determination as to the amount of Defendants' damages to be awarded. Or, in the alternative, the Defendants seek to have this case remanded for a new Trial.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of the foregoing Appellants' Brief on Appeal to Respondents' attorney, Cullen Y. Christensen, 55 East Center Street, Provo, Utah 84601 on this 8th day of June, 1977 postage prepaid.

